

US EPA ARCHIVE DOCUMENT

United States Environmental Protection Agency
Determination on Referral Regarding
Florida Administrative Code Chapter 62-303
Identification of Impaired Surface Waters

I. Executive Summary

Pursuant to a referral by the District Court in Florida Public Interest Research Group, et. al. v. EPA, No. 4:02cv408WS-WCS (N.D. Fla.), the U.S. Environmental Protection Agency (EPA) Region 4 reviewed the State of Florida's Identification of Impaired Surface Waters Rule (Impaired Waters Rule or IWR) for the purpose of determining whether the IWR, as applied by the State of Florida, revised or modified the State's water quality standards. For the reasons discussed below, EPA has concluded that, as applied by Florida, several portions of the IWR are new or revised water quality standards. EPA has also concluded, for the reasons discussed below, that many portions of the IWR are not new or revised water quality standards. EPA's determination that any provision of the IWR constitutes a new or revised water quality standard does not speak to whether the provision is consistent with the Clean Water Act (CWA or Act) nor is EPA making any approval or disapproval decision with respect to those provisions as part of this document.

II. Statutory and Regulatory Background

Under section 303(a)-(c) of the CWA, states are required to establish water quality standards. 33 U.S.C. § 1313(a)-(c). These standards describe the desired condition of a waterbody and consist of three principal elements: (1) the "designated uses" of the state's waters, such as public water supply, recreation, propagation of fish, or navigation; (2) "criteria" specifying the amounts of various pollutants, in either numeric or narrative form, that may be present in those waters without impairing the designated uses; and (3) antidegradation

requirements, providing for protection of existing water uses and limitations on degradation of high quality waters. See 33 U.S.C. § 1313(c); PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704-05 (1994); Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002) ("To determine the water quality standard, a state designates the use for which a given body of water is to be protected (fishing, for example), and then determines the level of water quality needed to safely allow that use. That level becomes the water quality standard for that body of water."). EPA's regulations at 40 C.F.R. Part 131 describe the minimum requirements for these three elements of water quality standards. EPA has also issued guidance for states and tribes in EPA's Water Quality Standards Handbook and the Technical Support Document for Water Quality-based Toxics Control.¹

The CWA sets forth a cooperative system under which states have the primary authority for setting water quality standards and EPA reviews a state's new or revised standards as they are adopted. See 33 U.S.C. § 1251(b), 1313(c). Under section 303(c) of the Act, 33 U.S.C. 1313(c), EPA is responsible for reviewing standards adopted by the states to ensure their consistency with the requirements of the Act. Any new or revised water quality standards adopted by states must be approved by EPA in order for those standards to be effective. 40 C.F.R. § 131.21(c)(2).²

¹ Water Quality Standards Handbook, USEPA-823-B-94-005, August 1994, <http://www.epa.gov/waterscience/standards/handbook/>; Technical Support Document for Water Quality-based Toxics Control, USEPA/505/2-90-001; PB91-127415; March 1991. <http://www.epa.gov/npdes/pubs/owm0264.pdf>.

² 40 C.F.R. 131.21(c)(2) provides in pertinent part:

If a State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000, then once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act unless EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect, in which case the EPA-promulgated water quality

Section 303(c) of the Act provides two distinct mechanisms by which EPA oversees state development of water quality standards. First, pursuant to section 303(c)(2)(A), states submit all new or revised standards to EPA for approval or disapproval.³ 33 U.S.C. § 1313(c)(2)(A). EPA must then approve or disapprove these standards within 60 or 90 days, respectively, of their submittal.⁴ Second, section 303(c)(4)(B) allows EPA, even in the absence of any submission of new or revised standards by a state, to publish revised water quality standards for a state “in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of the Act.” 33 U.S.C. § 1313(c)(4)(B). This latter provision allows EPA to assess the continued sufficiency of previously approved standards in light of changed circumstances or

standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard.

³ Section 303(c)(2)(A) of the CWA provides, in pertinent part:

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter...

⁴ Section 303(c)(3) of the CWA provides, in pertinent part:

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements...

new data, and ensures that states will continue to meet the goals of the CWA even if they fail to submit new or revised water quality standards to EPA.

On May 26, 1999, the Florida legislature enacted the Florida Watershed Restoration Act (WRA), which was then signed into law by the Governor and became effective on June 10, 2002. Fla. Stat. § 403.067. Among other things, the WRA directed the Florida Department of Environmental Protection (FDEP) to develop and adopt by rule a methodology to identify waters that are not attaining the State's approved water quality standards and, thus, are required to be included on any future impaired waters list developed by the State pursuant to section 303(d) of the Act. Id. at Subsection 3. In early 2000, FDEP formed a Technical Advisory Committee to help develop a clear, consensus-based method to define impaired lakes, streams, and estuaries.

On April 26, 2001, FDEP adopted Florida Administrative Code (FAC) Chapter 62-303, entitled Identification of Impaired Surface Waters (Impaired Waters Rule or IWR). The IWR establishes a methodology for the FDEP to identify waterbodies for inclusion on the list of water quality limited segments requiring total maximum daily loads (TMDLs) pursuant to section 303(d) of the Act and 40 C.F.R. Part 130.

III. The Court Proceedings

On December 2, 2002, a citizen suit was filed against EPA in the United States District Court for the Northern District of Florida, Florida Public Interest Research Group, et. al. v. EPA, No. 4:02cv408WS-WCS (N.D. Fla.). The complaint contains six claims. Claims 1-5 allege that particular provisions of the IWR modify Florida's water quality standards and that EPA failed to perform a mandatory duty under the CWA where EPA had not reviewed the IWR for consistency with the requirements of the CWA. Claim 6 is in the alternative to Claims 1-5. Claim 6 alleges that EPA has unlawfully withheld or unreasonably delayed its review of the IWR

as a policy affecting the application and implementation of Florida's water quality standards under 40 C.F.R. § 131.13.

After FDEP intervened in the litigation as a party-defendant, all parties filed motions for summary judgment. EPA argued in its motion that: (i) Florida's decision to identify or not identify waters as impaired does not modify the terms of the State's underlying water quality standards; (ii) the IWR is not a de jure revision to the State's water quality standards because the State had not engaged in the administrative process for such a revision; and (iii) the IWR could not operate as a de facto revision to the State's water quality standards because EPA must apply Florida's water quality standards as codified and approved by EPA in reviewing the State's section 303(d) list or "impaired waters" list (i.e., EPA must apply Florida's water quality standards for this purpose without regard to the IWR).⁵

The District Court ruled in favor of EPA. The District Court first concluded that Florida had not undertaken formal rulemaking necessary to make the IWR part of its water quality standards, and that EPA had not approved any modifications to Florida's water quality standards. See Florida Public Interest Research Group (FPIRG) v. EPA, No. 4:02cv408WC-WCS (N.D. Fla.), Doc. #64 (May 29, 2003) at 12. Accordingly, the Court found that the IWR was not part of the State's water quality standards and could not be relied on by EPA in its review of Florida's 303(d) list:

⁵ On May 31, 2005, Judge Mickle of the U.S. District Court for the Northern District of Florida granted summary judgment in favor of EPA in a case in which several environmental organizations sought review under the Administrative Procedure Act of EPA's partial approval/partial disapproval and addition of waters to the State's section 303(d) list update for 2002. (The State's 2002 list update was the first to be generated based on the State's application of the IWR methodology.) Judge Mickle found that EPA had properly applied the State's existing water quality standards in its review of the State's section 303(d) list update for 2002. See Sierra Club, et al. v. EPA, No. 4:04cv120SPM/AK, Doc. #91.

The CWA, as well as the EPA's implementing regulations, require EPA to consider a state's existing, EPA-approved water quality standards when reviewing a state's section 303(d) list. If Florida's listing methodology has resulted in a section 303(d) list that is inconsistent with the state's existing, EPA-approved water quality standards * * *, the EPA would be required to disapprove the list in whole or in part, and make its own listing decisions as appropriate. The listing methodology set forth in the IWR, in other words, cannot possibly have the effect of revising Florida's water quality standards or policies affecting those standards, provided that EPA complies – as it must – with the requirements of the CWA.

Id. (citations omitted). Thus, the Court concluded that the IWR neither “formally, nor in effect, established new or modified existing water quality standards or policies generally affecting those water quality standards.” Id. at 13. Accordingly, the Court held that EPA had no mandatory duty to review the IWR. Id.

Plaintiffs appealed the District Court's decision to the Eleventh Circuit Court of Appeals. The Court of Appeals reversed the District Court, based on a finding that the IWR could potentially be a change to the State of Florida's water quality standards. FPIRG, et. al. v. EPA, 386 F.3d 1070 (11th Cir. 2004). The Court of Appeals remanded the case back to the District Court for additional factfinding to determine whether or not application of the IWR by FDEP effected a change to the State's water quality standards. Id.

EPA subsequently requested and the District Court ordered the matter to be referred to the Agency for one hundred and twenty (120) days to allow the Agency to conduct an examination of whether the IWR, as applied by the State of Florida, revised or modified Florida's water quality standards. Pursuant to the Court's Order, EPA is to report its findings to the

District Court and all parties. This document and the administrative record for this determination constitute EPA's report.⁶

IV. Issue on Remand/Referral

The issue on remand and referral is whether, as a factual matter, Florida's application of the IWR effected a change or revision to Florida's existing water quality standards. Pursuant to the Order Granting EPA's Motion for Stay and Referral to the Agency, EPA has agreed to review the IWR as though it had been submitted for review under section 303(c) of the Act, 33 U.S.C. § 1313(c).

V. EPA's Analysis

As discussed above, water quality standards have three components: designated uses, criteria and antidegradation.⁷ PUD No. 1 of Jefferson County, 511 U.S. at 704-05; Sierra Club v. Meiburg, 296 F.3d at 1025.; see also 40 C.F.R. § 131.3(i) (definition of water quality standards as designated uses and water quality criteria); 40 C.F.R. § 131.12 (antidegradation requirements). The component of water quality standards most relevant to EPA's review of the IWR is the "criteria" component. Water quality criteria are "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). Water quality criteria describe the desired ambient condition of a waterbody to support a particular designated use.⁸

⁶ EPA is also filing today, pursuant to this Court's Order, a certified index to the administrative record for this determination.

⁷ Antidegradation policies are the third element of water quality standards. The requirements for state antidegradation policies are set out at 40 C.F.R. § 131.12. No provision of the IWR relates to antidegradation.

⁸ Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are attained. 40 C.F.R. § 131.3(3)(f).

Water quality criteria for protection of aquatic life also usually have three components. The first component is “magnitude,” level, or mass value (e.g., 10 mg/l) of a pollutant or pollutant indicator that can occur in the ambient water without adversely affecting the designated use the criteria is intended to support. The second component is “duration,” or the period of time over which the instream concentration is averaged for comparison with criteria concentrations. Duration is often referred to as an averaging period. The third component is “frequency,” or how often the magnitude/duration condition can be exceeded within a specified duration period and still protect the designated use. EPA’s Technical Support Document for Water Quality-based Toxics Control describes the importance of the magnitude-duration-frequency format:

[B]ecause of variation in the flows of the effluent and the upstream receiving water as well as variation in the concentrations of pollutants in the upstream effluent and in the receiving water, a simple format, such as specifying concentration that must not be exceeded at any time or place, is not realistic. Furthermore, such a simple format does not take into account the fact that aquatic organisms can tolerate higher concentrations of pollutants for short periods of time than they can tolerate throughout a complete life cycle. . . . Use of this concentration-duration-frequency format allows water quality criteria for aquatic life to be adequately protective without being as overprotective as would be necessary if criteria were expressed using a simpler format.

See Attachment 1 at D-1.⁹

Accordingly, in considering the IWR upon referral to the Agency, EPA interprets the CWA and its implementing regulations to include as “water quality standards” (or the relevant component of “water quality standards,” which is “water quality criteria” as that term is defined in 40 C.F.R. § 131.3(b)), those provisions of the IWR that define, change, or establish the magnitude (concentration), duration, or frequency that the State would use to determine when a

⁹Only the relevant Appendix of EPA’s Technical Support Document for Water Quality-based Toxics Control has been provided for convenience. The entire document may be found at www.epa.gov/npdes/pubs/owm0264.pdf.

waterbody is attaining any applicable water quality standards. Defined magnitude, duration, and frequency is also referred to herein as the established “ambient condition” or “level of protection.”

EPA understands that provisions in the IWR apply only to water quality attainment decisions used to identify water quality limited segments for addition to the section 303(d) list and they do not apply to permitting. See Fla. Admin. Code 62-303.100(3). However, those provisions of the IWR relating to magnitude, duration and frequency of concentration exceedances do define the “ambient condition” or “level of protection” that the State affords waters for purposes of making attainment decisions. An attainment decision is one where a State decides what it means to attain or to not attain any “water quality standard applicable to such waters” for purposes of establishing total maximum daily loads (TMDLs) under section 303(d)(1)(A) of the Act, 33 U.S.C. § 1313(d)(1)(A). TMDLs, in turn, serve as the basis for permit decisions. For these reasons, in order to determine whether any provision of the IWR constitutes a new or revised water quality standard, EPA reviewed each provision of the IWR based on a two-part analysis: (1) Does the provision relate to an attainment decision? (2) If so, does the provision define, change, or establish the magnitude, duration, or frequency related to water quality criteria necessary to support a designated use? Provisions that affect attainment decisions made by the State and that define, change, or establish the level of protection to be applied in those attainment decisions, affect existing standards implemented under section 303(c) of the Act. These provisions constitute new or revised water quality standards.

On the other hand, provisions that merely describe the sufficiency or reliability of information necessary for the State to make an attainment decision, and do not change a level of protection, are methodologies under section 303(d) of the Act. See 40 C.F.R. § 130.7(b)(6).

These provisions set out the circumstances that must exist for the State to make an attainment decision in the first instance and contain policy choices about the reliability of data; however they do not describe the condition of the water body assessed. EPA interprets CWA section 303(c)(2)(A), and its implementing regulations at 40 C.F.R. Part 131, not to include such a provision as a “water quality standard” as that term is used in section 303(c)(2)(A) of the CWA and its implementing regulations at 40 C.F.R. §§ 131.3(b), 131.3(i), 131.5(a)(2), 131.6(c), 131.11, and 131.20. This is because pursuant to the regulations, “water quality standards” consist of “designated uses” and “criteria” that are defined as descriptions of the ambient conditions of a water body. See CWA section 303(c)(2)(A) [33 U.S.C. § 1313(c)(2)(A)] and 40 C.F.R. §§ 131.3(i) (definition of water quality standard); 131.3(b) (definition of water quality “criteria”); 131.3(f) (definition of “designated uses”); and 131.3(i) (definition of water quality limited segment), also defined at 40 C.F.R. § 130. 2(j). A listing policy provision that describes sufficiency or reliability of information is not a water quality standard because it is not a “criterion.” It is not a “criterion” because it does not establish an ambient condition or level of protection by specifying a magnitude, duration, or frequency of water quality criteria exceedence that the State uses to identify water quality limited segments. It also does not establish a designated use. Therefore, this type of provision is not a water quality standard as that term is used in section 303(c) of the CWA or the regulations at 40 C.F.R. Part 131.

For example, some provisions of the IWR relate to the requirement pursuant to section 303(d) of the Act and 40 C.F.R. § 130.7(b) of “identification and priority setting for water quality limited segments still requiring TMDLs.” In particular, 40 C.F.R. § 130.7(b)(5) requires states to “assemble and evaluate all existing and readily available water quality-related data and information to develop the [section 303(d)] list.” Other provisions of the IWR relate to the

requirement pursuant to section 303(d) of the CWA and 40 C.F.R. § 130.7(b)(6)(iii) that states provide a rationale for decisions not to rely on certain data and information in developing the section 303(d) list. Primary examples of provisions of the IWR that are only section 303(d) methodologies include minimum sample size requirements, age of data requirements, and the requirement that FDEP know the pollutant causing a water quality impairment before that water may be included on the section 303(d) list. These provisions do not relate to the ambient condition in the waterbody, *i.e.*, what level of pollutant (or pollutant indicator) may be in the waterbody before determining that the waterbody is not meeting all applicable water quality standards. Instead, these provisions may relate to the information necessary to conduct an attainment decision pursuant to section 303(d) of the Act and 40 C.F.R. § 130.7(b)(5) - (6) (as compared to section 303(c) of the Act) and, as such, do not constitute water quality standards. Finally, the IWR contains many administrative and formatting provisions for constructing and adopting a 303(d) list, which also do not constitute water quality standards. Because EPA only has a duty to review new or revised water quality standards pursuant to CWA section 303(c), NWF v. Browner, 127 F.3d 1126, 1131 (D.C. Cir. 1997), EPA is not under a duty to review provisions of the IWR that implement other sections of the Act as new or revised water quality standards.

Table 1 below summarizes EPA's conclusions as to which provisions of the IWR constitute new or revised water quality standards pursuant to section 303(c) of the Act and identifies those provisions that implement other sections of the Act or are otherwise unrelated to water quality standards. EPA has determined that specified provisions of the IWR set out in the chart below are water quality standards because they define or revise an ambient condition or "level of protection" afforded the State's waters. In other words, these provisions describe a new

or different (1) level or concentration of pollutant or pollutant indicator allowed in the water, (2) duration or averaging period over which such concentrations or levels may occur, or (3) frequency of exceedence of those levels that the State regulation uses to assess whether a water is attaining applicable water quality standards. A more detailed analysis of all provisions, as well as EPA's rationale underlying each decision, is located in the administrative record for this determination.

EPA has determined that other provisions of the IWR do not constitute new or revised water quality standards for a number of reasons as also shown in Table 2, below. First, there are introductory statements with no regulatory effect. EPA does not review such provisions as substantive water quality standards. Second, there are provisions that simply restate the existing, EPA-approved water quality standards found at Fla. Admin. Code Chapter 62-302. Finally, as noted above, EPA has determined that a number of remaining provisions of the IWR are not water quality standards because they implement other provisions of the Act and do not affect an attainment decision related to a level of protection afforded by Florida to its ambient waters, as described more fully above.¹⁰

¹⁰ The fact that a provision of the IWR is not reviewed by EPA as a new or revised water quality standard does not remove that provision from EPA's oversight responsibilities. To the extent that such provisions do not comply with the requirements for developing impaired water lists pursuant to section 303(d) of the Act and its implementing regulations at 40 C.F.R. § 130.7(b), EPA has taken and will continue to take action as necessary when reviewing Florida's section 303(d) list submittals. After reviewing Florida's Group 1 Update, EPA decided that the IWR provision prohibiting the listing of any water based on less than 20 samples was not reasonable in all situations. EPA disapproved the State's failure to list certain waters based on this provision and added those waters to the State 303(d) list. EPA also decided that the IWR provision prohibiting the listing of any water where the pollutant causing an impairment is unknown was not reasonable. EPA disapproved the State's failure to list certain waters based on this provision and added those waters to the State list. See EPA's June 11, 2003, Decision Document regarding the FDEP's section 303(d) List. Judge Mickle granted summary judgment in favor of EPA, finding that EPA's partial approval/partial disapproval and addition of waters to

Although it may appear that EPA has identified numerous subsections of the IWR as new or revised water quality standards, the identified provisions all relate to five basic topics: (1) practices related to quantitative interpretation and analysis of water quality criteria (for example, the frequency of exceedence component of the statistical approach for attainment decisions related to numeric criteria); (2) use of biological thresholds for assessing aquatic life use support; (3) use of numeric thresholds for interpreting Florida's narrative standard for nutrients; (4) use of Florida Department of Health fish and shellfish classifications and advisories for attainment decisions, (5) and use of whole effluent toxicity test methods in ambient waters for use attainment decisions. The number of subsections in the IWR that EPA has identified as new or revised standards is more than the five topics listed above because each of these five topics may be discussed more than once in the IWR. The provisions of the IWR identified as a new or revised water quality standard are set forth in Table 1, below. The provisions of the IWR that EPA determines are not a new or revised water quality standard are set forth in Table 2, below.

Table 1

New or Revised Water Quality Standards¹¹		
Topic	Sections Covered	Subsections Identified
Practices Related to Quantitative Interpretation and Analysis of	62-303.320 & .420	320(1), 320(4), 320(5), 420(1), 420(2), 420(3), 420(6)

Florida's section 303(d) update for 2002 was not arbitrary and capricious. See Sierra Club, et al. v. EPA, 4:04cv120SPM/AK, Doc. #91.

¹¹ Please note that these tables provide a brief summary of EPA's determination regarding the IWR. For a complete explanation of EPA's decision, please see the following documents contained in EPA's administrative record: Doc. 1.2, Table: Whole IWR Sections that are not New or Revised Water Quality Standards, and Doc. 1.3, Table: Whole or Partial IWR Sections that are New or Revised Water Quality Standards.

Water Quality Criteria, Excluding Topics Listed Hereafter	62-303.360 & .460	360(1), 460(1), 460(2)
	62-303.380 & .480	480(1)
	62-303.400	400(1) (also applies to Biological Assessment and Fish and Shellfish Assessment)
Biological Assessment: Use of biological thresholds for aquatic life use support.	62-303.330 & .430	330(2), 330(3), 430(2), 430(3)
	62-303.200	200(1), 200(7), 200(18)
Nutrient Assessment: Use of numerical nutrient thresholds for attainment decisions.	62-303.351, .352, .353, & .450	351(1), 351(2), 352(1), 352(2), 352(3), 353(entire section), 450(1)
Fish & Shellfish Assessment: Use of Health Department Classifications and Advisories. (Also Uses Procedures in .320)	62-303.370 & .470	370(1), 370(2), 370(3), 470(3)
Toxicity Testing using ambient WET tests.	62-303.340 & .440	340(2), 340(3), 440(1)
Impairment Delisting Procedures	62-303.720	380(1)[by reference], 720(2)(a)-(g) and (i)

Table 2

NOT New or Revised Water Quality Standards		
Topic (Listing & Delisting)	Sections Covered	Number of Subsections Identified
Scope and Intent	62-303.100	Entire section (5 subsections)
Planning and Verified Lists	62-303.150, .300, .400, .700, .710	150(1), 150(2), 300(1), 300(2), 400(2), 700(1), 700(2), 710(1), 710(2).
Definitions	62-303.200	200(2), 200(3), 200(4), 200(5), 200(6), 200(8), 200(9), 200(10), 200(11), 200(12), 200(13), 200(14), 200(15), 200(16), 200(17), 200(19), 200(20), 200(21), 200(22), 200(23), 200(24),

NOT New or Revised Water Quality Standards

Topic (Listing & Delisting)	Sections Covered	Number of Subsections Identified
		200(25),
Aquatic Life Use Support	62-303.310 & .410	310(1), 310(2), 310(3), 310(4), 410
Exceedances of Aquatic Life-Based Water Quality Criteria	62-303.320 & .420	320(2), 320(3), 320(6), 320(7), 320(8), 320(9), 320(10), 420(4), 420(5)
Biological Assessment	62-303.330 & .430	330(1), 330(4), 430(1), 430(4)
Toxicity	62-303.340 & .440	340(1), 440(2), 440(3)
Narrative Nutrient Criteria	62-303.350 & .450	350(1), 350(2), 350(3), 450(2)
Primary Contact and Recreation Use	62-303.360	360(2), 360(3)
Drinking Water Use	62-303.380 & .480	380(2), 480(2)
Fish and Shellfish Consumption Use	62-303.470	470(1), 470(2)
Prioritization	62-303.500	Entire section (4 subsections)
Pollution Control Mechanisms	62-303.600	Entire section (2 subsections)
Impairment Delisting Procedures	62-303.720	720(1), 720(2)(h) and (j), 720(3).
Impairment of Interstate & Tribal Waters	62-303.810	Entire section (1 subsection)

VI. “Effects” Test

In its decision, the Eleventh Circuit suggested that in order to determine whether the IWR constituted a new or revised water quality standard, it would be necessary to "examine whether

there were waterbodies that were equally polluted both before and after the Impaired Waters Rule took effect, but that were classified differently depending on whether or not the Rule was used." FPIRG, et al. v. EPA, 386 F.3d 1070, 1090 (11th Cir. 2004). The Court stated "[t]hus, if waterbodies that under pre-existing testing methodologies would have been included on the list were left off the list because of the Impaired Waters Rule, then *in effect* the Rule would have created new or revised water quality standards, even if the language of the regulation said otherwise." Id. (emphasis in original).

For a number of reasons, it is not appropriate simply to look at whether a water was no longer listed or added to Florida's section 303(d) list after application of the IWR in order to determine whether the IWR provision constitutes a new or revised water quality standard.

First, such an "effects test" presumes that the first or original section 303(d) list correctly identified all impaired waterbodies. Without a methodology, however, it is often impossible to determine the basis for or validity of the initial listing decisions. Thus, more recent changes to the list may actually correct a mistake from a previous list, or may reflect a lack of certainty as to the basis for listing a water in the first instance.¹² Second, using a test of whether a provision of state law had an "effect" on a state's section 303(d) list could result in a situation where any state provision which causes a different result than that of a previous list would be classified as a water quality standard subject to EPA's mandatory duty to review pursuant to section 303(c) of

¹² In granting summary judgment in favor of EPA in the challenge to EPA's partial approval/partial disapproval and addition of waters following the State's submission of the 2002 section 303(d) list update, Judge Mickle found that EPA did not err in approving Florida's delisting of waterbodies for certain pollutants where the original basis for the listing was determined to have been inaccurate. See Sierra Club, et al. v. EPA, No. 4:04cv120SPM/AK, Doc. #91 at 19-22.

the Act, even if the provision clearly does not meet the definition of water quality standard under the CWA and its implementing regulations.

As EPA has set out more fully above, provisions of the IWR may have affected Florida's section 303(d) list in two different ways. For example, as described above, there are provisions of the IWR that describe the data requirements necessary for the State to find that it has reliable and/or sufficient data and information to make an attainment decision. These types of provisions do not change or further define the ambient condition of a water that represents attainment of the applicable water quality standards and thus the "level of protection" provided by Florida's water quality standards. EPA has determined that these provisions are not new or revised water quality standards but, rather, are policies for implementing section 303(d) of the Act. By contrast, there are provisions of the IWR that further define or change the magnitude, duration or frequency of a water quality standard (water quality criterion). EPA has determined that those provisions related to the ambient condition of a waterbody that represents attainment or nonattainment of the applicable water quality standard provide a level of protection for the water, and therefore are new or revised water quality standards subject to review pursuant to section 303(c) of the Act.

A strict application of the "effects" test suggested by the Eleventh Circuit would inappropriately expand the scope of water quality standards beyond use, criteria and antidegradation in a manner not contemplated by the CWA and its implementing regulations. Such a test would contravene the principle that mandatory duties be narrowly construed. See, e.g., Mountain States Legal Found. v. Costle, 630 F.2d 754, 766 (10th Cir. 1980); Monongahela Power Co. v. Reilly, 980 F.2d 272, 275-76 n. 3 (4th Cir. 1992)("The term 'nondiscretionary' has been construed narrowly."); NRDC v. Train, 510 F.2d 692, 700 (D.C. Cir. 1975)(in authorizing citizen suits under section 505 of the Act, "Congress did not fling the courts' door wide open,"

but rather confined such suits to “clear-cut” failures to perform mandatory duties); Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987); Oljato Chapter of Navajo Tribe v. Train, 515 F.2d 654, 663 (D.C. Cir. 1975)(Congress drafted citizen suit provisions so as “to limit suits against the Administrator to a chosen few” to enforce a specific duty clearly mandated by statute.); Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1353 (9th Cir. 1978)(“[T]he nondiscretionary duty requirement imposed . . . must be read in light of Congressional intent to use this phrase to limit the number of citizen suits which could be brought against the Administrator and to lessen the disruption of the Act’s complex administrative process.”).

EPA believes that applying the level of protection test pursuant to section 303(c) of the Act and its implementing regulations at 40 C.F.R. Part 131, rather than an effects test, is the appropriate interpretation of the term “water quality standard” as that term is used in the CWA and its implementing regulations.

V. Conclusion

For the reasons discussed above, EPA has concluded that, as applied by Florida, certain portions of the IWR are new or revised water quality standards. EPA has also concluded, for the reasons discussed above, that certain portions of Florida’s IWR are not new or revised water quality standards. EPA’s conclusions as to which provisions of the IWR constitute new or revised water quality standards are summarized in Table 1 above. A more detailed analysis of EPA’s analysis of all provisions of the IWR, as well as EPA’s rationale underlying each decision, is located in the administrative record for this determination.

7/6/05

Date

/s/

James D. Giattina, Director
Water Management Division